IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

KATHLEEN BROWN, :
Plaintiff :
:
v. : C.A. No. 03-224 (WDPA)
:
COST COMPANY, :
Defendant :

Trial in the above-captioned matter held on Friday, June 10, 2005, commencing at 8:39 a.m., before the Honorable Sean J. McLaughlin, Courtroom C, at the United States Courthouse, 617 State Street, Erie, PA 16501.

For the Plaintiff:
Richard S. Matesic, Esquire
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For the Defendant:
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REPORTED BY JANIS L. FERGUSON, RPR

I N D E X

(Whereupon the following discussion occurred on the record in camera:)

THE COURT: I gave you the revised charge, which I think addresses your point.

MR. MATESIC: It does.

THE COURT: So with those corrections, do I take it that you have no objection to the charge?

MR. MATESIC: One last thing.

THE COURT: All right.

MR. MATESIC: We have a Pennsylvania Constitutional claim in the Complaint. And I apologize, it slipped my mind. You said yesterday that, you know, the main objective is to get to the right result. The analysis is exactly the same.

THE COURT: It's duplicative. You're not losing. Why confuse the jury with the charge on it? That's my view.

MR. MATESIC: I would propose one sentence. Whatever you say about Title VII.

THE COURT: Well, why do it? What is the point? I mean, I just don't want to -- it's completely gratuitous -- I mean, why put something in that doesn't further the cause of making it simpler for the jury?

Let me put it this way: You're not losing anything in terms of damages by -- you can't get a double recovery, right?

MR. MATESIC: Right. We're asking to put it in because it informs the jury that not only has the Federal Government recognized the problem with discrimination, the State Government has as well.

In our proposed point for charge --

THE COURT: What does it say?

MR. MATESIC: At 24, it says, "The Pennsylvania Constitution provides that equality of rights under the law shall not be denied or abridged --"

THE COURT: So where would you want me to put a sentence in, in this charge that explains --

MR. PAWK: Can I see this, Rich?

MR. MATESIC: Sure, go ahead.

THE COURT: Under Page 6?

MR. MATESIC: Right. At the very end of that first page --

THE COURT: What page?

MR. MATESIC: I guess this is Page 7. Well, it would have to be both pages. Kathleen Brown, the federal law makes it -- on Page 6, you describe the federal law. And then right after that, you would say the Pennsylvania Constitution also provides da-da, da-da, da-da, okay, and the analysis is the same under both laws.

MR. PAWK: Judge, I would object at this point. I'll tell you why. They have never heard anything about

Pennsylvania -- he doesn't lose anything if you don't put it in. All they have heard about is Title VII, the Civil Rights Act, this entire trial --

THE COURT: I'm not going to put it in. If I thought that you were harmed in the slightest by doing it, I would put it in, but my view is it will be much clearer to the jury the way that this is set up.

All right. And the verdict slip, you have already indicated what your view of the verdict slip is. But do you each have a copy of the verdict slip? Let's go off the record.

(Discussion held off the record.)

MR. PAWK: One brief concern on the record. Just want to make a record. That's all. I know that -- I was concerned after my closing yesterday that Mr. Matesic made a motion for a mistrial. Quite frankly -- and I know that Mr. Matesic disagrees with the Court's earlier rulings in this case with respect to the statistical evidence, we'll call it, for lack of a better term, and he's tried many times to get it in over objection, et cetera, then made a motion for a mistrial after my closing, which, of course, I'm partial, but I didn't think I raised anything that warranted a mistrial motion.

I don't believe you would do this, but I am concerned that he might try to get a mistrial by saying

something in his closing that would be inappropriate. I hope that's not the case.

MR. MATESIC: That's not the case.

THE COURT: I have no doubt that Mr. Matesic would not do that.

MR. MATESIC: May I just note my objection on the on the record as to the Court's ruling.

(End of discussion in chambers.)

(Whereupon the proceedings resumed in open court at 9:05 a.m.)

MR. PAWK: Your Honor, just so the record is clear, we were just going through the exhibits. I would move for the admission of two exhibits that weren't already moved; Defense Exhibit W and Defense Exhibit DD.

THE COURT: They are admitted.

MR. PAWK: Thank you.

THE COURT: Mr. Matesic?

MR. MATESIC: Thank you, Your Honor.

Good morning, ladies and gentlemen. We're very close to the end of this process. I'm going to try to make my remarks as brief as possible.

Mr. Pawk talked to you yesterday about the truth finally coming out. He also talked to you about the smoking gun in this case. I'm glad he raised those two issues, because I also am going to address those issues.

The truth didn't come out for the first time during this trial. The truth was known a long time ago. Back in 2002, at that job site at Marienville, there were 162 Cost employees, and not a single one -- not a single one -- was a woman.

This case really poses the question, should a woman have to work harder than a man to get the same job. Should she have to jump through just one more hoop to get the same job that a man gets.

If you were one of the walk-on mason tenders who got hired that summer, if you were one of the walk-on mason tenders who Cost gave a $17-an-hour job to, what did you have to do to get that job? This is what you had to do: You had to walk right up to this trailer and present yourself and say give me a job. There was one more thing. You had to be a man.

What did Kathleen Brown have to do to get a $17-an-hour job? Well, she walked up to that trailer. She walked up to that trailer more than once. She walked up to that trailer with a copy of her resume. She walked up to that trailer with the Minority Recruitment Memorandum that she had filled out. We have looked at that memorandum a dozen times in this case. What does it say at the very bottom? Laborer, operator. Resume attached. What does her resume say? I am a laborer. What does Ron Barrett say? A

mason tender is a laborer. I have got experience. That's what Kathleen's resume says. I have got eight years of experience in construction. I am a laborer. I'm an oiler, I'm a field technician, I'm an operator.

I didn't know what those terms were. Those terms are unfamiliar to most people. Kathleen knows, because she's an experienced construction worker. She knows a lot about the building trade.

So she walked up not once, but twice, documents in hand. You know what? Dean Taylor -- Dean Taylor admits that Kathleen Brown handed him a copy of that Minority Recruitment Memorandum on the day she went to that job site. Well, to be more accurate, it depends on what day you asked Dean Taylor, as far as the answer to that question. Dean Taylor was asked that question in 2004, and he said, yes, she had this memorandum with her. What did he say to you a year later? "I don't remember that." What did Dean Taylor say when asked whether or not Kathleen Brown had ever asked for a laborer's job. What did he say in 2004? He said, I can't remember if she did. What did he say in 2005? "No." Filed a sworn affidavit. In that affidavit he said, she never asked me for a laborer's job. So Dean's story changed, not once, but twice.

Dean Taylor was asked, are women as capable as men. He was asked that question in 2004. His answer?

Generally speaking, they are. But there's one exception. What is the exception, Dean? Well, it's performing masonry work at a prison site. Because at a prison site, you don't use bricks. You don't use things that you can carry in your hands easily. You use blocks. Remember? He used his arms, he showed us the size of the blocks. Women weren't as capable as men of doing that kind of work. That's what he said in 2004. And what did he say when he had had a chance to tell you his story here? I really don't have an opinion about it; I don't know.

Ladies and gentlemen, what Dean Taylor did was try to take a middle position between equality for women and inequality for women. There is no middle position. You either believe that men and women are equal or you don't. You can't be a little bit pregnant. There's no middle position between those two points.

What Dean Taylor said was false. The question is, why did he say something that was false? There is more than one answer to that. Dean Taylor might be wanting to conceal his own bias. On the other hand, Dean Taylor's boss is the Defendant in this case. The woman who he answers to, Georgia Pawk, is a Defendant in this case. Dean Taylor is an 18-year employee of the Cost Company. 2002, he was running one of the biggest jobs that they had ever done. He had 162 employees under his command. Dean

Taylor's job is on the ropes. That's his livelihood. Do you suppose he might want to come to court and go to bat for his boss? Why would a person do such a thing?

You know, Dean Taylor is not the beginning and the end of this case. We asked Dean Taylor, Dean, of the 162 employees at that site, how many were female. He said zero. He gave us a lower estimate in the earlier part of his testimony. We later found out it was an even larger number, a larger disparity.

It just so happens that the Cost Company has an Equal Employment Compliance Officer. I take that back. She's the Equal Employment Opportunity Officer. Right? We were all together on Wednesday when I asked Ms. Pawk the question, what is your job title, and she answered my question. Do you remember me going to this board and writing it out word for word? Equal Employment Compliance Officer.

She was asked the same question in that chair yesterday. And what did she do? She corrected me. She said, I am the Equal Employment Opportunity Officer. She didn't correct me, she corrected herself. When was the last time you were asked what you do for a living and you gave the wrong answer? What does that say about her commitment to this; how important this really is to her? She can't even get the job title straight.

You know, actions speak louder than words. I asked Georgia Pawk 50 or 60 questions, and in at least a third of those instances, I would ask a question that required a simple yes or no answer, and she would go on for five minutes of all the things that she did to achieve this goal at Cost; equal employment. Is that right, Georgia? Is that your idea of equal employment (indicating)?

Dean Taylor said that Georgia Pawk never once came to Dean and said, Dean, I've got a problem with that number; 162 men and zero women. Actions speak louder than words, folks.

Do you remember these (indicating)? The stack of the Minority Recruitment Memoranda. Okay. This is Defendant's Exhibit 12. You're going to have this back in the jury room when you go back to deliberate. All right?

Now, what does Cost say on this memorandum? They say, at this time we may not be accepting employment applications --

THE COURT: Slowly.

MR. MATESIC: "-- but in the future, we would like to have some contact information of women who would want to work with us. We went through a stack of these.

When it comes time to hire a walk-on at this trailer, where was that stack of paper? Was it in that trailer so that Bill Heaton or Dean Taylor could use it to

get in contact with one of these people? No. Ladies and gentlemen, it was in a filing cabinet 100 miles away in Pittsburgh. Actions speak louder than words. Action speaks louder than words.

Georgia Pawk never took this document -- these documents, this stack of names and addresses, contact information, and gave it to the guys who were actually hiring.

What does this say at the top? All foremen, bricklayers, da-da, da-da. Laborers, right? Laborers. That's a very important point. They are seeking laborers. We all know now that the vast majority of laborers who were hired for this site came from the union hall. Okay? These aren't union members. So this information, a person who wants a laborer's position, who fills this out, the only way they are going to get a job is if the guys who are hiring during those limited, what, 12, 17 instances in 2002, they are only going to get a job if the hiring people have this information in front of them. Because in all other instances -- let's take the 15 or 17 names out of here. Okay? We're left with 145 names. Those other 145, okay -- well, actually, I'll say it a different way. We had 58 laborers among these 162. All right? So take out the 15 to 17 names of the walk-on employees. All right? The vast majority of the laborers came from the union. There were

only limited circumstances in which Cost could hire non-union members. The people who want to be laborers have sent their information to Cost. Cost never gives it to the guys who do the hiring. Actions speak louder than words, ladies and gentlemen.

I asked Georgia Pawk to tell us exactly why Kathleen Brown didn't get a job as a mason tender. She talked about this (indicating); no operator's position available. Their whole theory of the case is Kathleen only wanted an operator's position. That's what Mr. Pawk told you yesterday during his closing argument, that's what the witnesses said under examination by Mr. Pawk. All right? She only wanted an operator's position.

In other words, they want you to believe -- they want you to believe that Kathleen Brown, who in July of 2002 was making $395 a week, driving 450 miles a week, that she is going to hold out for a better-paying job. She is not going to take a $17-an-hour job located one mile from her home. That's what they want you to believe.

You know, the IRS has a mileage range. If you can deduct your mileage from your taxes, they tell you how much you can deduct based on your miles. Okay? That rate is based on things like the cost of gasoline, the cost of car maintenance, the cost of car insurance. I don't know what the figure is today. Back in the mid 90's, it was

somewhere around 30 cents. Let's say it's still 30 cents. What is 30 cents times 450 miles? $135. And that comes off of her net. All right? $400 a week, take out 20 percent for taxes, so she nets 320. And I am being charitable to the Defendant when I say she only loses 20 percent in withholding. She's down to 320. Now take out another 135. Where is she? She's below 200 bucks a week. And she's going to hold out, she's going to reject a $17-an-hour job?

What else did Kathleen Brown do to try to get a $17-an-hour job? Well, you saw her diary, you heard her testimony. I called this employer, I called that employer. I signed up with Career Link. I fractured wells. I helped a bricklayer for a couple days, I cleaned other people's homes, I cleaned the Kelly Hotel. I drove to Philadelphia; from the northwestern corner of the state to the southeastern corner of the state. What are we talking about? 320 miles? I drove all the way to Philadelphia to get a $15-an-hour job, no benefits. Okay? She is still working toward the goal. I want the $17-an-hour job, right? She is still scraping, scratching, clawing. She's trying to get up that hill. So that makes her an opportunist, Mr. Pawk?

Mr. Pawk argued yesterday, she's an opportunist, she's a gold digger. She filed three EEOC complaints. Do you suppose that when a guy like Dean Taylor

can say, in my 18 years as a bricklayer I have never worked alongside a female mason tender, do you suppose that that might indicate a problem in the construction trades? This is a feisty individual. She stands up for what she believes in.

Is this -- is this an example of something that women typically confront when they try to get a job in the building trades? Dean Taylor says, I never worked alongside a female mason tender. Can you think of any other profession in which a man could say that? In the last 18 years, I worked alongside this person, this -- this worker, and never once in that 18 years have the workers around me, the mason tenders around me, been women. Is there any other profession where it's that segregated? Can you think of one? He says it without blushing. It's not a problem for Dean.

But, again, Dean doesn't carry all the blame in this case. Cost Company -- Cost Company has somebody who is supposed to make sure that women are treated fairly. Right? Georgia Pawk. What message is Georgia Pawk sending to Bill Heaton and Dean Taylor? They both -- Bill and Dean have seen these things. They go out in their paychecks every month. Every month Dean and Bill know that Cost is collecting, is keeping on file records of people that aren't going to get hired. What message does that send to the guys

that are hiring? Does it send a message that the 162 is a problem, or does it send a message that it's not a problem?

Georgia Pawk said Kathleen Brown was not qualified to be a mason tender. She didn't have the skills. Georgia Pawk is not a laborer, ladies and gentlemen. Ronald Barrett is. He's been a laborer for decades. What did Mr. Barrett say? There's no school where you learn how to be a mason tender; you learn these skills on the job. What do you do as a mason tender? You mix mortar. You put it in a wheelbarrow. You carry it. You move it. You push planks around. You build scaffolding. You learn these skills on the job. Mr. Barrett said the lack of previous experience as a mason tender is not a disqualifier.

Who is the expert on what it takes to be a mason tender? Georgia Pawk or Ron Barrett?

What else did Ron Barrett say? Remember this guy, Mr. Bell, on the payroll records? Mr. Bell, the guy who worked the three double shifts? Had the distinction of working the most hours -- the new guy got the most hours that week; got all the bonus pay that week. Surprisingly, there's another employee who the records indicate worked 24 hours one day. We had to rely on Mr. Barrett to tell us when the walk-ons were hired, because they wouldn't tell us. What was their defense? Sorry, bad records. Sorry. What did Mr. Barrett say? If I have a dues authorization signed

on August 1st, 2002, this is what I infer; a vacancy, either on that day or the day before.

What day did Kathleen Brown write in her diary that she went though that job site? July 31st. You saw her diary. A daily account, line by line of all the things she did. Do you really believe that after she didn't get a job, she went out and purchased a diary and started creating entries in there because she's a gold digger? Is that what a gold digger -- is that what explains why Ms. Brown would drive 320 miles to Philadelphia to work a $15-an-hour job, why she would work for the state for $10.40 an hour, why she would clean somebody else's house, why she would clean somebody else's hotel room?

What else did Mr. Barrett say? At least three, right? Three hires, walk-on mason tenders. Men. The guys who, you know, walked up to the trailer, said hire me.

Kathleen Brown had given Dean Taylor her contact information on July 31st. Yeah, she didn't have a phone, because she was working this crummy job that didn't pay her any money. She doesn't -- she's not the best budgeter in the world. She lost her phone service. Whatever. What was stopped -- she was a mile away. She told them, I'm at the Kelly Hotel. Okay? All your bricklayers hang out at the Kelly Hotel. If you're

interested, that's how you can get a hold of me. Are you interested? Are you interested, Cost Company? The same Cost Company that doesn't have a woman yet. Are you interested?

What did Georgia Pawk say? Here is what she said: "I would love -- I would kill for a female foreman." Not to overuse a metaphor, ladies and gentlemen. If she had a female foreman, she would be dying to bring that person into court and introduce her to you. If she had a female mason tender, she would have brought that person to court and let her tell you how committed Georgia Pawk and the Cost Company are to the goal of equal employment. She would have done that. And she didn't. Actions speak louder than words.

Ladies and gentlemen, Judge McLaughlin, in a few moments, is going to give you instructions about the law. And I just want to review a couple of the points that he's going to make with you before I end my statement to you today.

The first one is this: If you find by a preponderance of the evidence that the reason given by Cost was not the real reason for its decision, you may, but are not required to, find in favor of Brown.

Now, what does that mean? Do wrongdoers in our society generally admit that they are wrongdoers? When

somebody does something bad, how often is it that they own up to it? You're right; I lied. I cheated at poker, I cheated on my taxes. How often does that happen? Would an employer who doesn't really care about equal employment, would a hiring supervisor who doesn't think they are as capable as men, would they admit that to you?

In this case Mr. Pawk talked a lot about how bad our evidence was. There's a particular problem that people in Miss Brown's position confront, because the people who did her wrong are not going to come into court and admit that. So the law has a very special standard, and the standard is appearing on your screen right now.

If an employer gives a false reason to explain what it's doing, the law permits you to infer that what the employer is really doing is covering up. It is covering up wrongful conduct. And on that basis, you can conclude what the employer is covering up is discrimination.

Do you believe what Georgia Pawk told you? Did she give you a convincing argument for why Kathleen Brown was not hired? Do you believe what Dean Taylor told you? Well, it's kind of hard to disbelieve the statement in his sworn testimony a year ago; women aren't as capable as men. Hard to disbelieve this (indicating). How about this? I don't know if there were any laborer's positions open. I don't keep any records.

Oh. No emergency phone number. She made an issue of that. She put that in the response that they filed with the EEOC. It was an incomplete application. She didn't give us an emergency phone number. We need emergency phone numbers, in other words, for people that we do not even employ.

If you think that they are not telling you the truth, you can conclude that what's really going on here is discrimination.

The second point I want to make, you're going to be asked to consider whether or not Cost's actions in this case were willful. And the law has a particular standard about that issue as well. And that's the portion that I have highlighted for you. A violation is willful if the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by Title VII.

Miss Pawk told you what Title VII is. Title VII is the federal law that was passed to protect women against discrimination in employment.

What is the opposite of reckless disregard? Commitment, diligence, decisive action.

She never once went to Dean Taylor to talk to him about this. Does that show diligence, commitment, decisive action? Three vacancies opened up in August. The

people who filled those vacancies, this document right here (indicating), it wasn't at that trailer. It was in Pittsburgh. Does that show diligence? Does that show commitment to equal employment? I didn't read Dean Taylor's deposition, she said. Miss Pawk is a securities fraud lawyer, white-collar crime. She went to Georgetown University. She didn't practice law for a long time, but she knows something about the law. She's the president of the Cost Company. Her company is the Defendant in this action. All of the evidence, the sworn evidence has been typed up in a deposition transcript. She never once took a peek to see what Dean Taylor had to say and --

(Mr. Matesic asked for clarification by the reporter.)

MR. MATESIC: She didn't look at that? And maybe my memory is a little fuzzy, and I apologize. I think she looked at some of the depositions. She did say that. She just didn't look at all of them. Well, there weren't too many in this case that we talked about.

One more portion of the Judge's instructions that I'd like to talk about. It starts here. "While Brown must establish that sex was a determinative factor in the action taken by Cost, she need not establish that sex was the sole factor."

I talked before about jumping through hoops.

I talked before about all the reasons that Cost gave for why Ms. Brown wasn't hired. If just one of those hoops was based on gender, if just one of those reasons was based on the fact that Miss Brown was a woman, that's all it takes. You have to return a verdict in her favor.

Ladies and gentlemen, I put some numbers on the board. It might have appeared a bit confusing at the time. I have prepared a document here that I'd like to go over with you concerning Ms. Brown's claims for damages.

Now, you see in the left-hand column the wages and pension benefits that she earned, and it's for the time period July 31st, 2002 until April 13th, 2003. April 13th is when she got that job with KGL -- excuse me, with Trumbill Corporation, where she was working for $17 an hour. That's when she got her $17-an-hour job.

What we have to do in determining her right to collect damages or back wages and pension benefits is add up all the money that she would have earned if she had worked for Cost, if she had been hired, and deduct from that any of the money that she earned through other sources during that same time period. And that's what this chart indicates. The total amount of the wages and pensions that she earned during that time period, that appears on the fourth line. Total wage and pension, $8,038.

Now, her wage claim. Had she been hired by

Cost, and had she remained an employee of Cost up through April 13th of 2003, she would have earned $25,725 in wages. She also would have gotten pension benefits; a pension contribution of $1.94 an hour over that. That totals $2,910.

So here is what we do: We add the pension that she would have earned from Cost to the wage that she would have earned at Cost, and then we take out the money that she actually earned, and what we are left with is $20,597. That's her claim for wages, for lost compensation.

That is not her only claim. Things were not going well for Miss Brown in 2002. And she will be the first one to admit. She doesn't blame Cost for all of her problems. She had problems with her kid, she had her own health problems to deal with. You know, life has been a struggle for this family. Life wasn't working out for her in 1997. She was living day to day. And that's why she wanted to get into the building trades. And she's had to scrounge for work ever since.

The bricklayers who were meeting up at the Kelly Hotel every night for beers were telling her, they are hiring people up the street. You're a laborer; go up and get that job.

And on July 31st, when she comes back without a job, how does she feel? The next day she's got to go back

to work for the State. She's got to drive 90 miles the next day because she failed to get that job. Now she's got to go back to her $10.40-an-hour job. So that hurts.

But then she loses that job in the middle of September or August. September -- I'll say September. She loses it. Now what does she have? Nothing. Now her life starts to unravel. She can't afford housing, has to bum money off friends, has to clean people's houses, can't sleep, drinking. Begins -- begins the downward descent. The lowest point of her life. Why? Would she have gotten there -- put it to you this way: Did she get there on her own, or did somebody from Cost give her a little push down the hill?

What is the value of the anguish that this woman described to you on the witness stand? I don't have a number. I don't have a chart for that. That's your decision. And the only guideline I can give you is fairness; what do you think is fair.

We're almost done. There is another kind of damages that the law provides in a case like this. It's called punitive damages. Punitive. It means punishment. The standard for punitive damages, ladies and gentlemen, the standard that we look at, reckless disregard. If you find reckless disregard in this case, then the law provides you the authority to punish Cost. Why? Because you have to

send a message. You have to send a message to Cost that this will not be tolerated.

I don't have a chart for punitive damages, ladies and gentlemen. Again, all that I have is one word; fairness. That's all that we ask.

At the beginning of this case -- at the beginning of this case, I suggested to you the picture of a woman in a hardhat. Can Georgia Pawk imagine a woman in a hardhat? Can she picture that in her mind? Well, she's going to have to, because in the summer of 2002, in Marienville, Pennsylvania, the only women wearing hardhats were in Georgia Pawk's mind. Thank you very much.

MR. PAWK: Can we approach, Your Honor.

(Whereupon the following discussion was held on the record at side-bar:)

MR. PAWK: Your Honor, I object. Mr. Matesic's entire closing argument was premised on the fact that there was zero women on the job site and 162 total employees; the very testimony that this Court sustained repeatedly throughout the case. In fact, the very question that he asked Dean Taylor was, "162 people on the job. How many were women?" Objection. We went to side-bar, and you sustained it.

His entire closing argument is premised on the fact that they had zero women on the job site, and out

of courtesy, I did not object at the beginning of his closing, but I think they need a curative instruction --

THE COURT: You're going too fast.

MR. PAWK: I'm sorry, Judge. I'm excited. Because we did not put any evidence in because that was sustained. We did not put any evidence as to other women they have hired. We did not establish the pool, as Your Honor instructed him. If he was going to get into that, he could not establish a pool.

In fact, when he tried to with Dean Taylor, Dean said, I can't tell you whether there was other women who applied at the job because I wasn't always at the trailer --

THE COURT: All right. What is your next point?

MR. PAWK: The clear testimony from Mr. Barrett, she would have to be eligible for any pension benefits. He just put that on the board.

THE COURT: That's up to the jury, to their recollection.

MR. MATESIC: Your Honor, the door was opened. Mr. Taylor clearly testified. He was asked the question, did Georgia Pawk ever come to you to talk about that number, and he said no; no quotas. We weren't talking about quotas, percentages, or anything of that nature. It was the simple question that got into evidence that 162 men, none of them

were female. It completely impeaches Miss Pawk's testimony that she would kill to have a woman on that construction site.

MR. PAWK: That's not what he said. He said she never talked to me about hiring women on that project. He never got into numbers. Your Honor, sustaining all those objections went to numbers. That's what it was. So now he's standing at the closing saying 162 people on the job, not one woman; isn't that a problem for Cost. He didn't argue any other facts in detail except for that. And that was in his closing.

I think they are left with an improper impression, based on all the other objections that were made and sustained in this case.

MR. MATESIC: And I would make one other point --

MR. PAWK: Just to finish that point. If that evidence would have come in, he would have brought in female, female. He said, in fact, in his closing, Georgia Pawk would kill for a female. In fact, she would have loved to have brought in a female before you in the jury -- she would have died to have brought a female to the court and showed her to you. We have female employees.

THE COURT: I thought I had ruled earlier in the case -- I made a lot of rulings in the case. But, in essence, one of my rulings was absent a sufficient

foundation, statistical evidence, i.e., the number of women who were on the job site at the peak period was not probative of whether or not there was discrimination in this case. Had I not made that ruling?

MR. MATESIC: My understanding of your ruling -- well, let me answer it this way: Mr. Taylor testified without objection that Miss Pawk never came in to address this issue of 162 individuals on the job site. Mr. Heaton and Mr. Taylor both testified that at the annual EEO meetings, there was never an issue brought up. That that information -- and Miss Pawk testified that she would kill to have someone as a female foreman. She never -- which indicates that she does not have a female foreman. She has never had a female foreman. That's what her testimony is. It is her testimony she never had a female foreman, it's in her deposition transcript. She has already acknowledged that she doesn't have a female foreman. And Mr. Taylor has already acknowledged that in the 18 years that he worked as a bricklayer, he never had a female mason tender. Okay?

If those pieces of evidence are in before the jury, they have to be able to connect the dots.

MR. PAWK: My objection goes to the numbers and then comparing it to zero women on this job. So to try to --

THE COURT: Excuse me a second. Are you

suggesting that with a curative instruction, the jury be told, in determining whether or not there was potential discrimination in this case, they may not consider the number of women who were on the work site?

MR. PAWK: That would be fine.

MR. MATESIC: I would consent to that.

THE COURT: All right, we'll do that.

(End of discussion at side-bar.)

MR. MATESIC: Pardon me.

THE COURT: You know, this is the last time we're coming up here. This is definitely the last time.

(Whereupon the following discussion was held on the record at side-bar:)

MR. MATESIC: I apologize, for the sake of my client's interest. I made a mistake. I don't want to have a consent. I want to place it on the record. I understand I have already given the Court my consent. I understand that. I don't mean to delay the proceedings any further. I want to withdraw my consent at this time. I apologize.

THE COURT: You don't have to. Don't apologize.

(End of discussion at side-bar.)

THE COURT: Ladies and gentlemen, it is now my duty to tell you about the law that is to be applied to this case, in which you will be the finders of fact. You have heard all the arguments and all the evidence, and it is my

function to charge you on the law which you are required to consider and which will govern your deliberations.

Let me also tell you before I go further in my instructions that I am going to supply you with a copy of these instructions so you don't have to -- unless you want to, you don't have to scribble furiously to get every word that I say down.

Now, as you know already, this is a civil action brought by the Plaintiff Kathleen Brown, hereinafter referred to as Brown, against Defendant Cost Company, hereinafter referred to as Cost. In this case Brown claims that Cost discriminated against her on the basis of her sex when it failed to hire her as an employee on July 31, 2002. She seeks damages as a result of that alleged discrimination.

Cost denies that its failure to hire Brown was based upon her sex and contends that it is not liable to her for any claimed damages.

Thus, what you will be call upon to decide at this time is whether Cost discriminated against Brown because of her sex when it failed to hire her as a laborer.

In deciding issues of fact in this case, it is your duty to follow these instructions. In doing so, you must take into consideration all of the instructions that I give you and not pick out any particular instruction and

disregard another one. Your duty is to determine the facts from the evidence that has been produced in open court, and you are to apply the facts as you find them to the law as I give it to you, and neither sympathy, nor prejudice should influence you in any way. Our system of law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Neither are you to be concerned with the wisdom of any rule of law stated by me.

At the outset, you should understand I'm absolutely neutral in presenting these instructions to you. I will not give you my opinion about any issue of fact to be determined by you. Nothing in the way in which I give my instructions to you is intended as an expression of my opinion about any fact issue in the case.

As I told you at the beginning, the evidence which you are to consider consists of the testimony of witnesses and the exhibits offered and received into evidence. Also, when the attorneys on both sides stipulate or agree to the existence of a fact, you must, unless otherwise instructed, except the stipulation and regard the fact as proved.

The proceedings during the trial have been governed by rules of law, as you know, and we have had a number of conferences to determine what evidence should be allowed to be submitted to you. From time to time it has

been my duty to rule on evidence to be submitted, and you should not concern yourself with the reasons for those rulings. You are not to consider any testimony or any exhibit to which I may have sustained an objection or any exhibit which may have been ordered stricken from your record or which has not been introduced into evidence.

Now, the attorneys here have argued very ably and thoroughly, and they have been well prepared. But their remarks -- that is, what they have said to you -- is not evidence. They have argued to help you understand the facts and their respective theories of the case, but their arguments, again, are not evidence.

You must consider as evidence only the testimony and the exhibits. If you find that any argument, statement, or remark of counsel has no basis in the evidence, then you should disregard that argument, statement, or remark.

Similarly, if you find that anything I tell you about the facts is not based on the evidence, you should disregard that too, because you are the finders of fact, and it is up to me only to tell you what the law is.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar situations in life. In this regard, a corporation is

entitled to the same fair trial in your hands as a private individual. All persons, including corporations, stand equal before in the law and are to be dealt with as equals in a court of justice.

When a corporation is involved, of course, it may act only through its natural persons or its agents or employees. And, in general, any agent or employee of the corporation may bind the corporation by his acts or declarations made while acting within the scope of his authority delegated to him by a corporation or within the scope of his duties as an employee of the corporation.

Now, the first matter of law about which I will instruct you is the applicable burden of proof. And the burden of proof is a concept which you must understand in order to give the case proper consideration. Because a verdict cannot be based on speculation or conjecture.

In civil cases such as this one, the Plaintiff has the burden of establishing every essential element of her claim. If the proof should fail to establish any essential element of the Plaintiff's claim by a preponderance of the evidence, then you should find for the Defendant as to that claim.

Here, the applicable burden of proof is by the fair weight or the preponderance of the credible or believable evidence. The fair weight or preponderance of

the evidence means evidence which has more convincing force when it is weighed against the evidence opposed to it, so that the greater probability of truth lies therein.

If we were to visualize evidence as something weighed in on an ordinary balance scale, and if the evidence admitted in support of the claim made by the party having the burden of proof is more weighty in probative value than the evidence offered in opposition, so it tips the scales on the side of that party, then that party has proved the claim by the fair weight or the preponderance of the evidence.

If, on the other hand, the evidence admitted in opposition to the claim of the party having the burden of proof outweighs or equally balances the evidence produced in support of the claim, it can be said that there has been a failure to carry the burden of proof imposed by the law.

When I say in these instructions that a party has the burden of proof on any proposition, or use the expression "if you find" or "if you decide", I mean you must be persuaded, considering all of the evidence in the case, that the proposition is more probably true than not.

It's important to note here that we speak of the quality of evidence and not necessarily its quantity. Also, all of the evidence admitted in support of and in opposition to a claim must be considered and not just the evidence offered by the party having the burden of proof.

In short, the test is not which side brings the greater number of witnesses or presents the greater quantity of evidence, but which witness or witnesses and which evidence you considered most worthy of belief. Even the testimony of one witness may outweigh that of many if you have reason to believe his or her testimony in preference to theirs.

The Plaintiff, Kathleen Brown, has brought this lawsuit against Cost Company under a federal law which prohibits sex discrimination in employment. The federal law commonly known as Title VII, the Civil Rights Act of 1964, or Title VII for short, makes it unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges -- privileges of employment because of such individual's sex.

Your first duty in this case is to determine whether Brown has proven her allegations that she was not hired as a laborer because of her sex. I will tell you the rules of law on which you should base this determination.

Title VII forbids employers against discriminating against employees on the basis of sex. However, Title VII does not require that persons of a certain sex receive special consideration or preferential treatment. Rather, Brown must prove by a preponderance of

the evidence that her sex actually placed a role in Cost's decision not to hire her as a laborer, and that her sex had a determinative influence on the outcome of that decision. This does not mean that Brown has to prove that sex was the sole cause of Cost's failure to hire her. Even if you find that other factors played a role, you may still find that sex played a determinative role in her not being hired if you find that Brown would have been hired, but for her sex. The burden of proof remains at all times with Brown to show that she was not hired as a laborer because of her sex.

Now, in order for Brown to prevail on her sex discrimination claim, you must first find that she has proven a prima facie case of sex discrimination by a preponderance of the evidence. To meet this burden, Brown must establish each of the following elements by a preponderance of the evidence:

First, that she is a member of a protected class. Second, that she applied for and was qualified for a laborer position for which Cost was seeking applications. Third, that she was rejected. And, fourth, that after her rejection, a laborer position remained open and Cost continued to seek applications from persons of Brown's qualifications.

I instruct you as a matter of law that Brown has met her burden of establishing Element Nos. 1 and 3;

that is, that she is a member of a protected class, and that she was rejected by Cost. You, therefore, will not have to pass upon those elements of the Plaintiff's case.

With respect to Element No. 2, I also instruct you that as a matter of law, Brown was qualified for a laborer position. Therefore, in terms of a prima facie case, you need only decide, first, whether Brown applied for a laborer position on July 31st, 2002. If you find that she did, you must then determine whether a laborer position was available when Brown applied. If you determine that Brown applied for a laborer position on July 31st, 2002, and that a laborer position was available when she applied, you must then determine whether a laborer position remained open and Cost continued to seek applications from persons of Brown's qualifications.

If you find that Brown failed to prove that she applied for a laborer position or that a laborer position was open when she applied or that a laborer position remained open and Cost continued to seek applications from persons of her qualifications, you must then find for Cost.

If you find by a preponderance of the evidence that the reason given by Cost was not the real reason for its decision, you may, but not -- but are not required to find in favor of Brown. Let me read that again,

just in case I misread it.

If you find by a preponderance of the evidence that the reason given by Cost was not the real reason for its decision, you may, but are not required to find in favor of Brown.

In determining whether the reason given by Cost for its failure to hire Brown was the real reason, or a false or pretextual reason, you may consider whether Brown has demonstrated weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in Cost's stated reason, or introduce evidence that discrimination was more likely than not the motivating cause of Cost's decision.

Let me also tell you at this time, in determining whether or not the Plaintiff was subjected to intentional discrimination, you may not consider as a factor in your determination the number of women that were on the work -- on the job site at any given time.

If you find that Brown applied for a laborer's position on July 31st, 2002, and that one or more laborer positions were open when she applied, and that one or more laborer positions remained open, and that Cost continued to seek applications from persons of her qualifications, you must then determine whether Cost intentionally discriminated against Brown because of her

sex. Brown cannot prove intentional discrimination by Cost simply by showing that its stated reason for the challenged employment decision is false. Rather, Brown must show both that the stated reason is false and that the real reason for the challenged employment decision is because of her sex. In other words, it is not enough for you, the jury, to disbelieve the stated reason by Cost. You must also believe that -- you must also believe Brown's claim that the decision was the result of intentional discrimination.

In order to satisfy her burden of proving intentional discrimination in connection with her claim that she was not hired as a laborer because of her sex, Brown must prove that but for her sex, this decision and event would not have occurred. This means that Brown must prove by a preponderance of the evidence that sex actually played a role in the decision-making process and that sex had a determinative effect on the outcome of the decision-making process.

On the other hand, while Brown must establish that sex was a determinative factor in the action taken by Cost, she need not establish that sex was the sole factor motivating Cost. Sex may be one of a number of factors contributing to the Defendant's action.

Again, the Plaintiff must demonstrate that sex was a determinative factor if she chose -- let me say

that again. Again, the Plaintiff demonstrates that sex was a determinative factor if she shows that but for her sex, the adverse action would not have happened. That is, but for her sex, she would have been hired as a laborer by Cost.

I will now instruct you on the law regarding damages which you may award if you have found by a preponderance of the evidence that Cost discriminated against Brown on the basis of her sex. You will not consider damages unless you find that Cost is liable to Brown.

Now, the fact that I am instructing you as to the proper measure of damages should not be considered as intimating any view of mind as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance, in the event that you should find in favor of the Plaintiff from a preponderance of the evidence in this case, in accordance with other instructions.

Brown is not required to prove her damages by mathematical certainty, but she does have the burden of proving her entitlement of damages by a preponderance of the evidence.

The first measure of damages that you may award is called back pay. Back pay is the amount of compensation Brown would have received in the past. The

appropriate measure of back pay is the amount of salary, plus fringe benefits that Brown would have received from July 31, 2002, to the present. If you find that Cost did not hire Brown because of her sex, an award of back pay is mandatory.

From the amount of money Brown must prove that she would have earned if she been hired as a laborer, you must deduct any money that she received from another employer during this time.

The second measure of damages that you may consider is compensatory damages. Compensatory damages include compensation for any emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life that Brown has suffered as a result of Cost's discrimination. For items such as these, there is not and there cannot be a fixed measurement. It is measured by the character, nature, and extent of the injuries as shown by the evidence. It is not compensation from a sentimental or benevolent standpoint, but an amount that would be the most reasonable amount of compensation under the circumstances as shown by the evidence. You should consider all the facts and circumstances as evidence and give Brown the amount that you believe will equitably, fairly, and justly compensate her for these damages.

Finally, if you find that Brown was

discriminated against by Cost on the basis of sex, then you must decide as part of the issue of Plaintiff's damages whether Defendant's conduct was willful. If you find that Defendant's violation of Title VII was willful, the Court will award Brown money damages in addition to that which you have awarded.

A violation is willful if the employer either knew or showed reckless disregard in the matter of whether its conduct was prohibited by Title VII. A violation is willful if it is done voluntarily, deliberately, and intentionally and not by accident, inadvertence, or ordinary negligence.

I caution you that the Plaintiff need not prove that the Defendant specifically intended to violate Title VII in order to demonstrate willfulness. The Plaintiff need only establish that the employer knew or showed reckless disregard for whether its conduct was prohibited by Title VII.

Violation of Title VII cannot be considered willful if you find that the manager who was involved acted in good faith. If you find that the manager has shown good faith and reasonable grounds for believing that he was not in violation of the Title VII by reason of the challenged employment action, you may not find willfulness.

As I will explain later, intentional

discrimination is seldom admitted, and it is not necessary to find direct evidence of intent to discriminate in order to find that the violation was willful. You may consider statements made, acts done or omitted, and all facts or circumstances received into evidence during the trial which show whether or not the Defendant acted willfully.

In determining the amount of damages, if any, that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation, or guesswork.

In deciding the facts of this case, members of the jury, you should consider all the evidence presented by the parties. Consideration of all the evidence, however, does not mean that you must accept all the evidence as true or accurate. In this connection, the evidence in this case consists of the sworn testimony of witnesses, regardless of who may have called them, all exhibits received into evidence, regardless of who may have produced them, and all facts which have been admitted or stipulated to by the parties.

There are two types of evidence which you may properly consider in deciding issues of fact in this case. One type of evidence is called direct evidence. Direct

evidence is where a witness testifies to what he or she saw, heard, or observed. In other words, when a witness testifies about what is known to him or her of his or her own knowledge by virtue of a witness' senses, what he or she sees, feels, touches or hears, that's called direct evidence.

The other type of evidence is called circumstantial evidence. Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. And I'll give you an example of what the term circumstantial evidence means.

Assume that when you came into the courthouse this morning, the sun was shining, and it was a nice day. And, of course, it is and it was. Assume that the courtroom blinds here were drawn so you couldn't look outside. As you were sitting here, somebody walked in the back with an umbrella that was dripping wet, and somebody else walked in with a raincoat that was also dripping wet. You cannot, of course, look outside of the courtroom to see whether it's raining, so you have no direct evidence of that fact. But based on the combination of facts that I have asked you to assume, it would, of course, be reasonable and logical for you to conclude that it had been raining. And that is all there is to circumstantial evidence. You infer on the basis of reason, experience, and common sense from an established

fact the existence or nonexistence of some other facts.

Circumstantial evidence is of no less value than direct evidence. As a general rule, the law makes no distinction between direct and circumstantial evidence. The law simply requires that before making a finding of fact, the jury must be satisfied that the fact has been proved by a preponderance of the evidence from all the evidence in the case.

While you may consider only evidence in the case in arriving at your findings of fact, you are permitted to draw such reasonable inferences from the testimony and the exhibits as you feel are justified in light of common experience. An inference is not a suspicion or a guess. A suspicion is a belief based on circumstances which do not amount to proof. A guess is speculation or conjecture. An inference, on the other hand, is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact that you know exists. In other words, you may reach conclusions which reason and common sense lead you to reach from the facts which have been established by a preponderance of the evidence.

There are times when different inferences may be drawn from the facts, whether proved by direct or circumstantial evidence. The Plaintiff will ask you to draw one set of inferences, while the Defendant will ask you to

draw another. It is for you and you alone to decide which inferences you will draw.

In deciding this case, members of the jury, you are required to pass on the credibility of witnesses. Credibility simply means believability. Your function is to decide what is believable, who is believable, and how much weight to give it. In doing this, you must use your common sense, your very background and experiences, the usual indicators of truth that you would all use in your daily life.

The witness' testimony depends on that witness' observation and perception of what he or she testifies to. It also depends on the witness' memory and what he or she experienced at the time and the witness' ability to create that experience in court. You may consider the degree of the witness' intelligence, demeanor, and appearance, the witness' frankness, his or her candor, the evasiveness or responsiveness, as well as the reasonableness or unreasonableness of the witness' testimony in light of all the circumstances.

You may also consider any interest or bias that might lead a witness to exaggerate, understate, or otherwise color their testimony, such as a witness' interest in the outcome of the case or a bias or prejudice that a witness might have in favor of or against a party. This is

not to suggest that the interest or bias of the witness will lead the witness to tell you a falsehood or color their testimony one way or the other, but bear these factors in mind in passing on the credibility or believability of every witness.

A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time the witness has said or done something or has failed to say or do something which is inconsistent with the witness' present testimony. If you believe that any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

You are not required to accept testimony, even though the testimony is uncontradicted and the Defendant is not in -- and the witness, rather, is not impeached. You may decide, because of the witness's bearing and demeanor or because of the inherent improbability of that witness' testimony or other reasons which are sufficient to you that such testimony is not worthy of belief.

I charge you that if you find a witness has lied to you in any material portion of their testimony, you may disregard that witness's testimony in its entirety. I say that you may disregard that testimony, not that you

must. If you choose to disregard the testimony of any witness because you believe the witness has been untruthful with you, there must have been untruthfulness in a material portion of that witness' testimony. You must be careful, though, that the untrue part of the testimony was not as a result of a mistake or inadvertence, but was, rather, willful and stated with the design or intent to deceive.

Regardless of whether a witness' testimony is untruthful by design or inadvertence, however, you may reject all or any portion of the testimony, as in the case of any witness, if the testimony is not believable by you. On the other hand, you may be convinced that despite the falsity of a part of the witness's testimony, he or she in other parts testified truthfully.

Now, you may find inconsistencies in the evidence, even actual contradictions in the testimony of witnesses, although it does not necessarily mean that any witness has been willfully false. Poor memory is not uncommon. Sometimes witnesses forget. Sometimes he or she remembers incorrectly. It is also true that two persons witnessing the same incident may see it or hear it differently.

If different parts of the testimony of any witness or witnesses appear to you to be inconsistent, you should try to reconcile the conflicting statements, whether

of the same or different witnesses, and you should do so if it can be done fairly and satisfactorily. If, however, you find that there are genuine and irreconcilable conflicts in their testimony, it is your function and your duty to determine which, if any, of the contradictory statements you will believe.

In this case you were called upon to assess the intent of the decision-makers who acted on behalf of Cost. Intent ordinarily may not be proved directly because there is no way of scrutinizing the operations of the human mind. But you may infer a person's intent from surrounding circumstances. You may consider any statement made or act done or omitted by a party whose intent is an issue and all of the other facts and circumstances which indicate his or her state of mind, you may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly admitted. It is for you to decide those facts. It is -- rather, it is for you to decide what facts have been established by the evidence.

Liability for violation of Title VII depends on the state of mind or motive of the individual who made the employment decision at issue at the time the employment decision was made. Title VII does not protect people from mistakes, bad decisions, or even harsh or unfair complaint

decisions, but only from adverse employment decisions motivated by sex. It is not your role as the jury to assess the fairness or unfairness of Defendant's actions, but only to determine whether that decision was motivated by sex.

Now, as I mentioned at the beginning, I am entirely neutral about the outcome of this case. I don't want you to think that anything I said, any instruction I have given you, any ruling I have made on the evidence, or any statement I made to counsel or you implies that I have any position at all in this case, other than to give you fairly the law that you are required to apply, and that you will rule fairly and impartially on the evidence that has been submitted to you. I have absolutely no interest in how this case resolves itself, only in the procedure by which it is done. As I told you before, it is for you and you alone to determine the facts of the case and credibility of the witnesses.

If your recollection of the testimony varied with any statements that were inadvertently made by me or counsel or any party, you have to be guided by your own memory and your own recollections of the testimony. You determine the facts from all the testimony that you heard and from the other evidence which has been received during the trial. Neither I, nor anyone else, may infringe on your responsibilities as sole judges of facts.

On the other hand, and of equal importance, you must accept the rules of law as I have given them to you and apply those rules to the facts of the case.

Now, in the next minute or so I am going to instruct you on your deliberations; that is, what you are to do when you retire to the jury room.

First, the attitude and conduct of the jury at the outset of the deliberations are matters of considerable importance. When you retire to the jury room for your deliberations, they should proceed in an orderly fashion.

The first order of business in the jury room will be to be select one person to act as the foreperson. You are free to select any one of you to act in that capacity. The foreperson will preside over your deliberations and will speak for you here in court, should that become necessary.

One more thing about the foreperson. The fact that somebody is a foreperson does not mean that his or her vote is entitled to any greater weight than the vote of any other juror.

Now, in the course of your deliberations, if you should find yourself in doubt concerning any part of my instructions to you about the law, you may request further instructions or clarification. If that event, you should

transmit a note signed by the foreperson to me through my courtroom staff. Nobody should try to communicate with the Court by means other than a signed writing. I will not communicate with you on any manner -- on any subject, rather, relating to the merits of the case, except in writing or orally here in court with all counsel present.

You should not at any time reveal even to me how you stand numerically until you have reached a verdict.

The responsibility is to reach a fair conclusion from the evidence and the applicable law, and that is an important responsibility. Your verdict should be reached only after careful and thorough deliberations, during which you should consult with each other and discuss the evidence and the reasonable inferences to be drawn from the evidence freely and fairly in a sincere effort to arrive at a just verdict.

It is your duty to consider the evidence with a view toward reaching agreement on a verdict, if you can do so without violating your individual judgment and conscience. You must decide this case for yourself, examining the issues in evidence with candor and frankness and with proper deference to and with regard to the opinions of each other. Mature consideration requires that you be willing to reexamine your own views and to change your opinions if you are convinced that your opinions lack merit

or validity.

On the other hand, while you may maintain this flexibility, no juror is required to surrender his or her honest convictions as to the weight or the effect of the evidence because another juror's opinion differs from his or hers or for the mere purpose of returning a verdict. The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict, therefore, must be unanimous.

Keep in mind that the dispute here between the parties in this case is for them a most serious matter. They and the Court rely on you to give full and conscientious deliberation and consideration to the issues in evidence before you. You should not allow prejudice or sympathy to influence your deliberations. You should not be influenced by anything other than the law and the evidence in the case. Both of the parties here stand equal before the Court, and each is entitled to the same fair and impartial treatment at your hands.

Now, when you go to the jury room, you are going to get the document called Special Interrogatories. This is, in other words, a verdict form. And it tracks the -- in some measure, the charge that I have given you. Read it carefully, follow it carefully.

At the back of the -- on the last page of the verdict form, there is -- there are lines for the foreperson and the individual jurors to sign. When you reach a verdict, each juror must sign the document. And although there is no date form that appears on this, you also have to date it. So, remember, everybody sign it and then date it. All right.

(Courtroom clerk duly sworn at this time.)

THE COURT: Why don't you take the jury back there, and I have a few matters to take up with the lawyers.

(Jurors begin deliberations at 10:30 a.m.)

THE COURT: I just want to make sure. Are we all squared away? You have agreed on the exhibits that are going out; is that right?

MR. MATESIC: Yes. We are still working on them. We are just putting together the books.

MR. PAWK: Mine are ready. They are agreed upon.

THE COURT: So, in other words, it doesn't require any more involvement on my part.

MR. MATESIC: I think -- I don't think I formally admitted the exhibits. I haven't read them into the record.

THE COURT: All right. Why don't you do that.

MR. MATESIC: All right. At this time Plaintiff moves for the admission of Plaintiff's Exhibit 7, Plaintiff's Exhibit 8, Plaintiff's Exhibit 9, Plaintiff's

Exhibit 11, Plaintiff's Exhibit 12, Plaintiff's Exhibit 13, Plaintiff's Exhibit 14, Plaintiff's Exhibit 18, Plaintiff's Exhibit 19, Plaintiff's Exhibit 20, Plaintiff's Exhibit 22, and Plaintiff's Exhibit 24, and Defendant's Exhibit U-28, Defendant's Exhibit U-23, Defendant's Exhibit U-25, Defendant's Exhibit U-26, Defendant's Exhibit A-1, Defendant's Exhibit W-1 -- I'm just going to read all the W's. W-1, W-5, W-8, W-10, W-12, W-14, W-16, W-18, W-22, W-31, W-32, W-34, W-42, U-12 -- Defendant's Exhibit U-12 -- I apologize -- and Defendant's Exhibit F-3.

THE COURT: Is that it?

MR. MATESIC: That's it.

THE COURT: Those are admitted. All right.

(Proceedings adjourned at 10:35 a.m. till 1:30 p.m.)

(Whereupon the following discussion took place on the record in camera:)

THE COURT: Let's go on the record here. Out of an abundance of caution, I took a look at 42 USC 1981 on this issue of damages. And, frankly, I had -- I must have been thinking of another statute or statutory scheme when I was talking about molding it. I don't think that's appropriate. I think looking at it, it's a jury question -- the jurors -- let me read three.

"The sum of the amount of compensatory

damages under the section for future pecuniary losses, emotional pain, inconvenience, mental anguish, and other nonpecuniary losses and the amount of punitive damages awarded under the section shall not exceed for each of the complaining party and in the case of the respondent who has more than 134 and fewer than -- the next group higher, 100 to a cap of 300. So there's no doubling here of punitive damages. The jury can enter their own award. And I'm going to bring the jury out and tell them that right now. All right?

MR. PAWK: What does your charge say?

THE COURT: My charge says the Court will set punitive damages. That is incorrect. I have been working under a misconception for whatever reason. I don't know why I would be. Maybe I drew a blank that it was simply an exercise of mathematical doubling. That's not the case. I am going to tell them it's up to them to award, if they find the need.

MR. PAWK: I would appreciate it if you say it that way.

(End of discussion in camera.)

(Jury returned to courtroom at 1:32 p.m.)

THE COURT: Members of the jury, lest you think that judges never make mistakes, I'd like to disabuse you of that, because I did, and I want to call it to your attention

in connection with your deliberations.

On Page 13 of the jury charge, at the top of the -- at Page 13 of the jury charge at the top of the page, I told you in my charge, "If you find that Defendant's violation of Title VII was willful, the Court will award Brown money damages in addition to that which you have awarded."

The fact of the matter is, under the statutory scheme, if you were to conclude that Cost Company, per No. 6 in your special interrogatory form, willfully, or recklessly discriminated against Kathleen Brown because of her sex, then it will be up to you to enter an amount of punitive damages. And there is no line for that, but if you decide to do it, you would simply put the figure directly under No. 6. Is that clear to everybody?

All right, Becky.

(Jury recessed to resume deliberations at 1:36 p.m.)

(Proceedings resumed in open court at 2:41 p.m. with the jury present.)

THE COURT: I understand you've reached a verdict. Would you please give your verdict slip to my courtroom deputy. If the verdict is in order, you can publish the verdict. Let me make sure it's dated. I think it was.

THE CLERK: In the United States District Court

for the Western District of Pennsylvania, Kathleen Brown, Plaintiff, versus Cost Company, Defendant, Civil Action No. 03-224-Erie, Special Interrogatories, No. 1, "Do you find that Plaintiff, Kathleen Brown, has proven by a preponderance of the evidence that she applied for a laborer position on July 31, 2002? Yes."

"No. 2. Do you find that Kathleen Brown has proven by a preponderance of the evidence that a laborer position was available at Cost Company when she applied? No."

No. 3 is left blank. No. 4 is left blank. No. 5 is left blank, and No. 6 is left blank, and it's dated June 10th, 2005, signed by the seven jurors.

THE COURT: Members of the jury, let me take -- do you have any requests?

MR. MATESIC: If the jury is willing to speak with counsel for the Plaintiff, we would be very happy for those discussions.

THE COURT: No, I'm not talking about that now. I'm talking about do you want them polled?

MR. MATESIC: I do want them polled.

THE CLERK: Juror No. 1, would you please stand. Is the verdict as read your verdict?

A JUROR: Yes.

THE CLERK: Juror No. 2, would you please stand.

Is the verdict as read your verdict?

A JUROR: Yes.

THE CLERK: Okay, thank you. No. 3, would you please stand. Is the verdict as read your verdict?

A JUROR: Yes.

THE CLERK: Okay, thank you. No. 4, is the verdict as read your verdict?

A JUROR: Yes.

THE CLERK: Thank you. No. 5, is the verdict as read your verdict?

A JUROR: Yes.

THE CLERK: No. 6, is the verdict as read your verdict?

A JUROR: Yes.

THE CLERK: No. 7, is the verdict as read your verdict?

A JUROR: Yes.

THE CLERK: Thank you.

THE COURT: Members of the jury, let me take this opportunity to thank you for your service. Although the reality is everyone thanks you, but you don't have a lot of choice. You get the thing in the mail, and you've got to be here. But what you do have a choice about is your promptness and your attentiveness. And I see a lot of juries come through here, and you have been very prompt, and

you have been very attentive.

When you come to this courthouse, as you have over the last several days, you have seen court security officers, clerk's office personnel, court reporters, law clerks, lawyers, Judge, but nobody in this courthouse, really, is more important than the jurors, because without the jurors, to state the obvious, we would not be able to have jury trials. And that's the system that we're very proud of.

On the way out, I would simply ask that you check within the clerk's office downstairs. I'm sure they have no further need for you. It sounds rather final, doesn't it. But poke your head in. And wait just a minute in the jury room. I'm going to poke my head in and thank you from a perch other than this bench before you leave.

All right. We now are adjourned.

(Proceedings concluded at 2:46 p.m.)